STATE OF MICHIGAN

COURT OF APPEALS

ALAN T. ACKERMAN and ACKERMAN & ACKERMAN, P.C.,

Plaintiffs-Appellees,

v

DAVID MIOTKE, AUDREY MIOTKE, and ST. CLAIR PACKAGING, INC.,

Defendants-Appellants.

UNPUBLISHED
April 4, 2006

No. 265004
Wayne Circuit Court
LC No. 01-132672-CK

Before: Cooper, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's judgment granting plaintiffs' motion for summary disposition and awarding plaintiffs $875,000 in accordance with a contingency fee agreement. We affirm.

Defendants owned property in Detroit in the area where the Motor City Casino is now located. On July 29, 1998, when the casino development projects in Detroit were increasing land values downtown, defendant David Miotke ("Miotke") contacted plaintiff Alan Ackerman ("Ackerman") for advice. Miotke conceded in his deposition that he selected Ackerman because of news articles he had read identifying Ackerman as involved in representation of various parties in land deals connected to the downtown casino development projects. Miotke and Ackerman met the following day, and as a result of that meeting, on July 31 Ackerman faxed to Miotke handwritten notes describing the fee agreement they had discussed. Also on July 31, Miotke prepared a document that began "I am pleased to have you represent St. Clair Packaging in the sale of our Detroit land and facility," and included the same terms Ackerman's handwritten notes had set out as well as additional details. Among the terms were:

> We agree to pay you 3% commission on that part of the sale over $1,500,000.00 to $3,000,000.00. This $45,000.00 will be in the form a [sic] a donation to the Archdiocesce [sic] of Detroit.
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> We further agree to pay you 12-1/2% of that part of the sale which exceeds $3,000,000.00. If the sale exceeds $5,000,000.00, we can expect an additional $10,000.00 to $12,000.00 legal fee for handling the sale.

Miotke never sent this letter to Ackerman, but did retain it in his files and produced it during discovery. In his deposition, Miotke confirmed that his document accurately reflected his understanding of his "deal" with Ackerman, and stated that he did not send the letter because he was "hoping it wasn't necessary." To clarify his meaning, Miotke added that he might have sent the letter, "had he [Ackerman] sent me something more substantial [than the handwritten notes]."

In March of 2001, defendants sold the property at issue to the Motor City Casino for $10,000,000, a significant increase over the $300,000 they had been offered in July of 1998. Miotke then consulted with Val Saph, the attorney he retained for other matters, and Mr. Saph informed him in an opinion letter dated July 5, 2001 that he had no obligation to pay plaintiffs for their services because plaintiffs had acted as real estate brokers without being licensed as such, and were therefore not entitled to any fees.[1] Saph added that even if Ackerman had been acting as an attorney, he was precluded from recovering fees by a conflict of interest and because the fees expected were excessive. Plaintiffs subsequently commenced this action, alleging that defendants refused to pay for their services in accordance with the fee agreement.

On November 1, 2002, the trial court ruled on plaintiffs' first motion for summary disposition, finding that the services plaintiffs provided to defendants were legal services and not real estate services, and ordering trial on the alleged conflict of interest and the reasonableness of the fee. On August 16, 2005, the trial court granted plaintiffs' motion for summary disposition, rejecting defendants' arguments that the fee agreement was unenforceable because of a conflict of interest, or because the contingency fee amount was excessive or unreasonable.

We review a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although plaintiffs moved for summary disposition under both MCR 2.116(C)(9) and (10), it is apparent that the trial court looked beyond the pleadings when deciding plaintiffs' motion, so MCR 2.116(C)(10) is the applicable rule.[2] A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995), lv den 451 Mich 857 (1996). Questions of law are reviewed de novo. *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004).

Defendants argue that the question of whether plaintiffs' representation was tainted by a conflict of interest is a question of fact for the jury and that the trial court improperly decided the issue as a matter of law, thereby violating their right to a jury trial. This Court has generally held that the determination of whether a conflict of interest exists is a question of fact. *Camden v*

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[1] Saph stated in his deposition that Miotke had told him he hired Ackerman for real estate advice, not as an attorney.

[2] A motion under MCR 2.116(C)(9) is limited to the pleadings only. *Slater v Ann Arbor Pub Schools Bd of Ed*, 250 Mich App 419, 425-426; 648 NW2d 205 (2002).

Kaufman, 240 Mich App 389, 399; 613 NW2d 335 (2000); *Buchanan v City Council of Flint*, 231 Mich App 536, 547; 586 NW2d 573 (1998). However, where there is no genuine issue of material fact, a court may decide the question as a matter of law. *Babula*, *supra* at 48. In this case, we agree with the trial court that defendants failed to show a genuine issue of material fact with respect to their defense that plaintiffs' fee agreement is unenforceable because of a conflict of interest.

It is a bedrock principle of conduct that "[a]n attorney owes undivided allegiance to a client and usually may not represent parties on both sides of a dispute." *Attorney Gen v Pub Service Comm*, 243 Mich App 487, 500; 625 NW2d 16 (2000), quoting *Barkley v Detroit*, 204 Mich App 194, 203; 514 NW2d 242 (1994). However Rule 1.7 of the Michigan Rules of Professional Conduct (MRPC) allows for some interpretation as to what constitutes a conflict. Section (a) of the rule states that a "lawyer shall not represent a client if the representation of that client will be directly adverse to another client unless the lawyer reasonably believes the representation will not adversely affect the relationship with the other client and each client consents after consultation." On these facts we find no direct adversity. Section (b) of the rule adds that a "lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless the lawyer reasonably believes the representation will not be adversely affected and the client consents after consultation." We find plaintiffs' representation of defendants was not materially limited by plaintiffs' representation of other clients with property to sell in Detroit. On a close reading of the rules and the facts, there was no actual, as compared to speculative, conflict.

Defendants argue that a conflict of interest existed because plaintiffs represented two sets of clients who were attempting to sell their properties to the casinos. Plaintiffs argue that because the locations of the permanent casino sites was initially uncertain, and the city had the final say on where the casinos would be located, there was no direct conflict as between the various property owners. The trial court determined that the evidence did not support a claim of direct adversity of interests. We agree.

Defendants also argue that plaintiffs were materially limited in their representation of defendants because plaintiffs at the same time represented Tom Vigliotti, a riverfront property owner, and broker for the Motor City Casino through his company Vigliotti Realty. However, although Vigliotti's firm was working on behalf of the Motor City Casino, Vigliotti was represented by plaintiffs in his individual capacity in negotiations concerning riverfront property. Generally, the representation of a principal of an adverse party on an unrelated matter does not establish a conflict of interest. See *Radtke v Miller, Canfield, Paddock & Stone*, 209 Mich App 606, 620-621; 532 NW2d 547 (1995), rev'd on other grounds 453 Mich 413 (1996). Ackerman testified that his representation of Vigliotti did not create a conflict of interest because the matters were separate; no evidence was presented to rebut this testimony other than the bare assertion of the conflict, and the facts here are simply not clear enough to speak for themselves.

Defendants also argue that a conflict of interest existed because Ackerman had an interest in property in Greektown, which was a possible casino site. However, defendants failed to offer any evidence, beyond speculation, that Ackerman's property in Greektown was a legitimate site for expansion of all three casinos. Given that the properties were in separate and distinct locations, and that neither plaintiffs nor defendants could control the siting decisions that the

City of Detroit or the casinos collectively or individually might make, the record does not include sufficient evidence to conclude direct adversity of interests existed or that Ackerman's interest in separate property materially limited his ability to represent defendants' interests.

The Comment to Rule 1.7 clarifies that "simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent." While the comments are instructive only, we do find them particularly instructive here. Each seller in this conglomeration of downtown transactions was essentially a competing economic enterprise. Representing several properties to the various buyers in that market at that time did not necessarily mean shortchanging the representation of any to benefit one of the others. In any case, when the City of Detroit determined that the riverfront was not a viable location for the casinos, even the general adversity that may have existed between the riverfront property owners and defendants became immediately moot, and at that time Ackerman was still working on Miotke's behalf to realize the highest possible price for his property.

Defendant argues that plaintiffs failed to disclose the potential conflict of interest or explain how the multiple representation might affect plaintiffs' representation of defendants. Both sub-sections of the rule require informed consent from the clients in the event of a conflict. Here the facts undermine this argument: Miotke admitted that he approached Ackerman regarding this transaction specifically because he knew that Ackerman was then representing other interested parties in the casino development projects, and would therefore be a knowledgeable resource, and at no time during the representation did he object to the conflicts he now alleges prejudiced his interests. A close reading of the depositions indicates that Miotke's argument that he was unaware of the import of the conflict is as disingenuous as the argument that he hired Ackerman as a real estate agent rather than as an attorney. In addition, the rule specifically requires consent only in the event of actual direct adversity or material limitation of representation, and we find neither here.

Defendants' final conflict argument is that it was unethical for Ackerman to require them to pay a portion of the earned fees, $45,000, directly to the Archdiocese of Detroit. According to defendants' expert witness, a conflict of interest existed because defendants were asked to discharge an obligation of Ackerman's, which Ackerman did not disclose to defendants. We agree with the trial court, however, that regardless of the purpose of the payment, there is no basis for concluding that Ackerman's request that a portion of his fee be paid to another entity affected Ackerman's representation of defendants.

To be clear, we find that plaintiffs' conduct here was within the precise lines of the Michigan Rules of Professional Conduct; there is no violation of the Rules.[3] We cannot say

[3] The MRPC, unlike the Judicial Canons of Ethics, do not include a prohibition against the appearance of impropriety. However, while the conduct at issue here does not technically violate any Rule, it does make us uneasy. We note that where, as here, there is an appearance of impropriety, inquiry is almost sure to follow, and attorneys are well advised to avoid conduct that comes so near to the line.

defendants were harmed by any actionable conflict of interest such that their contract with plaintiffs is unenforceable. Traditional principles of contract law and a strict reading of the MRPC indicate that here defendants have no ground to avoid their obligation to pay plaintiffs for plaintiffs' performance under the contract. The trial court did not err in granting summary disposition for plaintiffs on the ground that defendants failed to show a genuine issue of material fact with respect to conflict of interest.

The import of the determination of whether the Rules of Professional Conduct were violated lies in this Court's decision in *Evans & Luptak, PLC v Lizza*, 251 Mich App 187; 650 NW2d 364 (2002), lv den 467 Mich 935 (2002). This Court there held that "unethical contracts violate our public policy and therefore are unenforceable." *Id.* at 189. On the facts of that case, the attorney's unambiguous dealing on both sides of the transaction presented a clear case of conflict and violation of the Professional Rules. Contrary to defendants' arguments on appeal, *Evans & Luptak* simply does not stand for the proposition that the remedy of fee forfeiture will be inflexibly applied where the potential for conflict exists. Because on the facts of this case we find the trial court did not err in finding there was no conflict of interest, *Evans & Luptak* is inapplicable.

Defendants next argue that the trial court erred in granting summary disposition for plaintiffs on their defense that the fee agreement was unenforceable because the contingency fee amount was excessive or unreasonable. We disagree.

Defendants rely on an affidavit from their expert witness to support their argument that the fee agreement was unethical and violated MRPC 1.5. We conclude that the affidavit does not support defendants' argument. Defendants' expert argued that the fee agreement violates MRPC 1.5 because the agreement does not explain the option of paying an hourly rate, but MRPC 1.5 does not require this. Further, although MCR 8.121(E) requires an attorney to advise a client of other payment options before entering into a contingent fee agreement, the rule does not require that this be done in writing. It is noteworthy that Miotke stated in his deposition that he is familiar with the hourly method of paying for legal services, since that is how he pays Saph, and that he had no interest in paying for services related to the sale of his property on an hourly basis.

Defendants' expert also stated that the fee was excessive in relation to the actual work plaintiffs performed, and the lack of novel or difficult legal issues involved. We disagree. This matter was pending for approximately three years; plaintiffs were retained in 1998 and the property was sold in 2001. During that time plaintiffs communicated with potential buyers and advised Miotke. The issues might not have been novel, but the value of the property implies complex negotiations and the need for counsel versed in this level of real estate transaction. Although the fee is admittedly high, we cannot say it is clearly excessive. The fact that Miotke agreed to an offer without consulting Ackerman does not establish that plaintiffs were not entitled to a fee in accordance with the fee agreement. Clients take inherent risks in contingent fee arrangements, and their attorneys do the same; an agreement entered willingly is not unenforceable simply because it results in a large bill.

Defendants' expert also stated her belief that this contingency fee was excessive because real estate attorneys typically charge by the hour. Although MRPC 1.5(a)(3) permits taking into account the fee customarily charged in the locality for similar legal services when deciding if a fee is unreasonable, the only evidence here presented was defendants' expert's opinion offered

without corroborating facts or statistics. Neither MRPC 1.5 nor MCR 8.121 prohibit an attorney from agreeing to a contingency fee in a real estate case, and in fact, MCR 8.121(E) allows an attorney to decide the type of fee agreement.

We conclude that defendants failed to show a genuine issue of material fact with respect to their claim that the contingency fee agreement was unenforceable under MRPC 1.5 because the fee was either excessive or unreasonable. The trial court properly granted summary disposition for plaintiffs on this question.

Defendants additionally argue that defendant Audrey Miotke is not liable for any attorney fees because only her husband David retained plaintiffs and she did not have an attorney-client relationship with plaintiffs.

In *Macomb Co Taxpayers Ass'n v L'Anse Creuse Pub Schools*, 455 Mich 1, 11; 564 NW2d 457 (1997), our Supreme Court explained that an express agreement with an attorney is not required to establish an attorney-client relationship. Rather, "[t]he rendering of legal advice and legal services by the attorney and the client's reliance on that advice or those services is the benchmark of an attorney-client relationship." *Id.* The Court observed:

> "[T]he relation of an attorney and client is not dependent on the payment of a fee, nor is a formal contract necessary to create this relationship. The contract may be implied from conduct of the parties. The employment is sufficiently established when it is shown that the advice and assistance of the attorney are sought and received in matters pertinent to his profession. [*Id.*, quoting 7 Am Jur 2d, Attorneys at Law, § 118, pp 187-188.]

Defendant Audrey Miotke admitted in her deposition that she and her husband David were "like one person" and that David retained plaintiffs to represent both of their interests, and that both benefited from the transaction. Under the circumstances, the trial court properly found that Audrey was also liable for plaintiffs' attorney fees.

In light of our disposition of this case, it is unnecessary to address defendants' remaining issues.

Affirmed.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen
/s/ Jane E. Markey